Supreme Court, U.S.
FILED
FEB 9 1999
OFFICE OF THE CLERK

No. 98-986

In the Supreme Court of the United States

OCTOBER TERM, 1998

DAIMLERCHRYSLER CORPORATION,

Petitioner,

v.

KOLOSSO AUTO SALES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

REPLY BRIEF FOR PETITIONER

ALLAN M. HUSS
DaimlerChrysler Corporation
1000 Chrysler Drive
Auburn Hills, MI 48326
(248) 512-4126

ERIKA Z. JONES
Counsel of Record
JOHN J. SULLIVAN
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 463-2000

Counsel for Petitioner

1488

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES . . . . . (ii)

A. The Seventh Circuit Did Not Assume — "Implicitly" Or Otherwise — That The State Had A Public Purpose. 2

B. The Conflict In The Lower Courts On The Effect Of Prior Retroactive Legislation. 5

1. Prior Wisconsin Statutory Provisions Did Not Regulate the Relocation of Dealers. 6

2. Kolosso's Assumptions On The Merits Do Not Alter The Circuit Conflict. 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

Cases:

Allied Structural Steel v. *Spannaus*,
438 U.S. 234 (1978) 3, 4

Energy Reserves Group, Inc. v.
Kansas Power & Light Co.,
459 U.S. 400 (1983) 2

Holiday Inns Franchising v. *Branstad*,
29 F.3d 383 (8th Cir. 1994) . . . . . passim

Kuhl Motor Co. v. *Ford Motor Co.*,
71 N.W.2d 420 (Wis. 1955) 5

New Motor Vehicle Bd. v. *Orrin W. Fox Co.*,
439 U.S. 96, 106 (1978) 5

Triegle v. *Acme Homestead Ass'n*,
297 U.S. 189 (1936) 1, 3, 5

Veix v. *Sixth Ward Building & Loan Ass'n*,
310 U.S. 32 (1940) 8

Wipperfurth v. *U-Haul Co.*,
304 N.W.2d 767 (Wis. 1981) 5

Statutes:

Wis. Stat. § 218.01(2)(e) (1985-86) 7

Wis. Stat. §218.01(3)(a)(11) (1985-86) 6

TABLE OF AUTHORITIES—Continued

Page(s)

Statutes:

Wis. Stat. § 218.01(3)(a)(14) (1985-86) 6

Wis. Stat. § 218.01(3)(a)(16) (1985-86) 6

Wis. Stat. § 218.01(3)(a)(17) (1985-86) 6

Wis. Stat. § 218.01(3)(a)(24) (1985-86) 7

Wis. Stat. § 218.01(3)(a)(26) (1985-86) 7, 8, 9

Wis. Stat. § 218.01(5)(a) (1985-86) 6

Wis. Stat. § 218.01(3)(a)(32) (1985-86) 8, 9

Wis. Stat. § 218.01(3)(f)(1) (1985-86) 8, 9

Other Authorities:

THE FEDERALIST NO. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961). 3

NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, reported by James Madison, August 28, 1787, (Norton ed. 1987) 10

REPLY BRIEF FOR PETITIONER

The Brief in Opposition fails to engage the issues raised in the Petition. Respondent Kolosso does not deny that the Seventh Circuit's holding that "little" contractual impairments "need not be justified" (App. 10a) flatly contradicts this Court's requirement that a state's impairment of contracts "must be * * * for an end which is in fact public." *Triegle* v. *Acme Homestead Ass'n*, 297 U.S. 189, 197 (1936). Moreover, respondent does not deny that the Eighth Circuit's reasoning in *Holiday Inns Franchising* v. *Branstad*, 29 F.3d 383, 385 (8th Cir. 1994), cannot be reconciled with the decision below. And Kolosso does not deny that, in the absence of clear guidance from this Court, the lower courts will be in disarray over the appropriate criteria to judge the "substantiality" of a contract impairment.

Instead, Kolosso seeks to deflect attention from the decision below, and its unsettling effect on Contract Clause jurisprudence, by raising two irrelevant arguments. First, respondent erroneously asserts that the Seventh Circuit, contrary to its plain holding that "little [contractual] impairments * * * don't have to be justified at all" (App. 10a), implicitly "assumed" that there was sufficient public justification here to support the State's retroactive impairment of private contracts (Opp. 9-13). Second, Kolosso attempts to obscure the split in the circuits over the significance of the absence of prior ***retroactive*** legislation on the required foreseeability analysis by pointing to different (and wholly inapplicable) prior ***prospective*** legislation (Opp. 17-23).

Neither argument addresses the questions presented or rebuts Chrysler's explanation why review should be granted. As we and the *amici* supporting the Petition have demonstrated, see Brief of the Association of International Automobile Manufacturers, Inc., General Motors Corporation and Ford Motor Company As *Amici Curiae* In Support of Petitioner, the conflict in the lower courts on the issues presented is intolerable and should be resolved promptly by this Court.

A. The Seventh Circuit Did Not Assume — "Implicitly" Or Otherwise — That The State Had A Public Purpose.

Faced with the plain language in the opinion by Chief Judge Posner holding that "little [contractual] impairments * * * don't have to be justified at all" (App. 10a), Kolosso attempts to avoid addressing the clear conflict that holding creates with this Court's precedents by alternately miscasting the decision below and attempting to rewrite it.

1. Kolosso first tries to bury the Seventh Circuit's explicit holding that Wisconsin had no public justification for the statutory amendment at issue.[1] Opp. 9-13. The court of

---

[1] In its discussion of the statutory amendment's public justification, Kolosso misapprehends the relationship between the acceptable use of a state's police power and the public justification requirement for Contract Clause purposes. This Court has left no room for error, however: "The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests." *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U.S. 400, 412 (1983). It is irrelevant, therefore, that the Seventh Circuit did not invoke the phrase "police power" (Opp. 9), because by dispensing with the need for a legitimate public purpose, the court below also eliminated the "guarantee[] that [Wisconsin] is exercising its police power, rather than providing a benefit to special interests."

Ironically, it is precisely this desire to prevent state special interest legislation affecting interstate commerce which prompted adoption of the Contract Clause. "[L]aws impairing the obligation of contracts are contrary to the first principles of the social compact, and to every principle of sound legislation. * * * The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting public rights, become jobs in the hands of enterprising and influential spectators, and snares to the more industri-

appeals' language, however, cannot be so casually dismissed. The court stated: "Even big, totally unpredictable impairments of the obligation of contracts can survive challenge under the contracts clause if they are responsive to economic emergencies, and even to considerably less exigent needs — so much less as to impel us in that opinion to describe the contracts clause as having been 'defanged.' The little, predictable impairments * * * don't have to be justified at all * * *." App. 9a-10a (citations omitted). The court then proceeded to reject Wisconsin's justifications in no uncertain terms: "the justifications that its lawyers have offered for the 1993 amendment are hard to take seriously." App. 10a.

To avoid the manifest tension between the holding below and this Court's requirement that any state impairment of contracts "must be * * * for an end which is in fact public," *Triegle,* 297 U.S. at 197, Kolosso first argues that the Seventh Circuit merely "d[id] not address" (Opp. 9) the important issue whether Wisconsin provided any public justification for the statutory amendment. Shortly after making this argument, however, respondent asserts that the Seventh Circuit "implicitly assumed" that the justification Kolosso now provides was sufficient. Opp. 12.

Both of these statements, however, fail to address the plain holding in the opinion below: ***no*** public justification is necessary if the contractual impairment is "little." App. 10a. This statement that "little, predictable impairments * * * don't have to be justified ***at all***" (App. 10a, emphasis added), is no mere "paraphrase" of this Court's statement that "[m]inimal alteration of contractual obligations may end the inquiry at its first stage," as Kolosso suggests. Opp. 12., quoting *Allied Structural Steel* v. *Spannaus*, 438 U.S. 234, 245 (1978). Far from holding that ***no*** public justification is

---

ous and less-informed part of the community." THE FEDERALIST NO. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961).

required, *Allied Structural Steel* reinforces the requirement that "legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the ***public purpose justifying its adoption.***" *Id.* at 244 (emphasis added).

The Seventh Circuit strayed far beyond this Court's precedents. Kolosso's argument that the court of appeals impliedly "assumed" a public purpose fails in the face of the decision's blanket statement that no public justification "at all" is required to satisfy the "defanged" Contract Clause.

2. As a back-door recognition that the Seventh Circuit could not and did not discern a public purpose for the statutory amendment on dealer relocation, Kolosso next attempts (unsuccessfully) to rewrite the court's opinion and provide the missing public justification for the challenged provision. Kolosso's attempt fails because of its fundamental misunderstanding of Chrysler's constitutional challenge and the court of appeals' decision. As the Seventh Circuit recognized, Chrysler here seeks only to have the retroactive section 218.01(3x) declared invalid, not the entire Act. App. 2a. And it is precisely this section for which the State's justifications are "hard to take seriously." App. 10a.

Instead of merely attempting to rewrite the court's holding on this particular retroactive amendment, however, Kolosso sweepingly defends the entire prospective Dealer Act, which is simply not at issue. Opp. 13-16. Indeed, aside from Kolosso's Brief in Opposition, neither party nor the court below has ever considered whether the entire Act has a public justification (nor would they, since the prospective Act would not likely impair any existing contracts).[2]

---

[2] Kolosso's unhelpful argument is not furthered by its citation to irrelevant cases. See Opp. at 13-16, quoting *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 106 (1978) (upholding temporary stays of new franchising pending hearings on the merits

Kolosso's erroneous assertions notwithstanding, the Seventh Circuit's language does not admit room for implicit "assumptions" or *post hoc* supplements. The court clearly and simply held that "little" contractual impairments "don't have to be justified at all" (App. 10a), thus purporting to create a "small impairment" exception to this Court's requirement that all contractual impairments must have an end "which is in fact public." *Triegle*, 297 U.S. at 197.

B. The Conflict In The Lower Courts On The Effect Of Prior Retroactive Legislation.

Kolosso also fails to come to grips with the substance of the circuit conflict on the retroactivity issue, instead trying to focus attention on the existence of different ***prospective*** legislation in the various cases. Opp. 17-23. What Kolosso fails to realize, however, is that the circuit split concerns the effect of the absence, or unconstitutionality, of prior ***retroactive*** legislation.

The Eighth Circuit, in *Holiday Inns Franchising* v. *Branstad*, 29 F.3d 383, 385 (8th Cir. 1994), used two criteria to determine that a retroactive franchise provision was not foreseeable: (1) previous state franchise legislation had not been retroactive, and (2) retroactive application of similar franchise statutes elsewhere had "almost uniformly been held unconstitutional." Both criteria were met in this case, but the Seventh Circuit ignored the Eighth Circuit's approach and

---

against a due process challenge); *Kuhl Motor Co.* v. *Ford Motor Co.*, 71 N.W.2d 420, 427 (Wis. 1955) (upholding prospective Dealer Act as valid under Due Process and Equal Protection clauses). The Wisconsin Supreme Court has explicitly held that *Kuhl* is inapplicable in Contract Clause cases: "The *Kuhl* case dealt with prospective application of legislation on the freedom to contract, while the instant case involves the retroactive application of legislation on the obligation of existing contracts." *Wipperfurth* v. *U-Haul Co.*, 304 N.W.2d 767, 770 (Wis. 1981).

instead focused solely on past prospective legislation. See Petition 17-18.

Kolosso's assumption that prior ***prospective*** legislation in an area should be the only controlling foreseeability factor merely restates the Seventh Circuit's position. Not once does Kolosso rebut Chrysler's argument (Pet. 15-18) that the court of appeals' analysis cannot be reconciled with the analysis of the Eighth Circuit in *Holiday Inns Franchising* v. *Branstad*, 29 F.3d 383 (8th Cir. 1994).

1. Prior Wisconsin Statutory Provisions Did Not Regulate the Relocation of Dealers.

Kolosso wastes many words (Opp. 17-20) trying to create the erroneous impression that Section 218.01(3x) was foreseeable because the State of Wisconsin had supposedly regulated extensively the relocation of motor vehicle dealers at the time Chrysler and Kolosso bargained for Kolosso's no-relocation clause.

The statutes Kolosso cites, however, hardly demonstrate that Wisconsin had "pervasively" regulated the relocation of motor vehicle franchises. Kolosso fills its brief with citations to irrelevant statutory provisions (not cited by the Seventh Circuit), such as those regulating the rights of family members of deceased dealers (Opp. 3, citing 218.01(3)(a)(26) (1985-86)),[3] but ultimately recognizes that only two provi

---

[3] Kolosso provides a laundry list of general provisions from the Dealer Act, including those governing a manufacturer's unfair trade practices (Wis. Stat. § 218.01(5)(a) (1985-86)), coercion of a dealer to enter into an agreement (Wis. Stat. § 218.01(3)(a)(16) (1985-86)), unfair cancellation (Wis. Stat. § 218.01(3)(a)(17) (1985-86)), unconscionable business practices (Wis. Stat. § 218.01(3)(a)(11) (1985-86)), violations of laws relating to the sale, distribution, or financing of motor vehicles (Wis. Stat. § 218.01(3)(a)(14) (1985-86)), unreasonable closure of a dealer point (Wis. Stat. § 218.01(3)(a)(24) (1985-86), and the rights of family

sions merit any discussion. Neither provision, however, comes close to regulating the relocation of protected dealers.

Kolosso first relies on Section 218.01(3)(a)(17) (1985-1986), which prevents a manufacturer from unfairly canceling a motor vehicle franchise. Kolosso assumes, without support or citation, that terminations invariably accompany attempted relocations (Opp. 18), but the patent falsity of that assumption is easily demonstrated by the fact that Chrysler has not terminated Kolosso's franchise in this case. Since termination is not the only remedy available for a breach of contract, such as an unauthorized relocation (see App. 8a, listing injunctive relief and damages), a statutory provision preventing unfair termination or unfair trade practices hardly constitutes a warning that a state would enact a (retroactive) provision eliminating a manufacturer's contractually-bargained-for veto of dealer relocations.

By relying on unfair termination and unfair trade practices statutes,[4] Kolosso essentially argues that once a state has established a general obligation of fair dealing or fair termination, all future regulation of the contract (of any kind) is foreseeable and thus all contracts in the industry or trade are fair game for retroactive impairment. This broad argument clearly cannot be reconciled with this Court's precedent. See,

---

members of deceased dealers (Wis. Stat. § 218.01(3)(a)(26) (1985-86). Opp. 2-3. None of these provisions even remotely governs a dealer relocation in breach of contract and Kolosso makes no argument that these provisions made Section 218.01(3x) foreseeable. Equally ludicrous is respondent's apparent suggestion that the Dealer Act's requirement that a dealer's license specify its location (Wis. Stat. § 218.01(2)(e) (1985-86)) made legislation eliminating contractually-bargained-for vetoes of relocation foreseeable. See Opp. 7.

[4] Kolosso cites, but does not discuss, several irrelevant unfair trade practices statutes. See *supra* note 3.

e.g., *Veix* v. *Sixth Ward Building & Loan Ass'n*, 310 U.S. 32, 38 (1940) (upholding "further legislation ***upon the same topic***" because the challenger "purchased into an enterprise already regulated ***in the particular***") (emphasis added).

Kolosso's second attempt to prove foreseeability is based on Section 218.01(3)(a)(26m) (1985-1986), which prohibits a manufacturer from unreasonably refusing "to allow a dealership to share ***its*** facilities with another or who unreasonably refuses to allow a dealership to add another franchise ***at the same location*** as its existing franchise or franchises." (emphasis added). Kolosso tries to transform this provision, which does not even mention relocation, into a bar on a manufacturer's veto of a relocation, so long as the relocation was designed to allow dealerships to share facilities ***at a different location***. Opp. 18-19. Not only has the statute never been applied in this contorted manner, but such an overly generous reading would be barred by the straightforward statutory text. The statute prevents manufacturers only from unreasonably refusing to allow a dealer to share "its" facilities or add a franchise "at the same location." Moving to share another franchise's facilities is simply not protected.

In sharp contrast to the two general provisions on which Kolosso bases its argument, two provisions of the Dealer Act did mention relocation at the time Chrysler and Kolosso were at the bargaining table, but the inapplicability of those sections is even more patent. See Wis. Stat. § 218.01(3)(a)(32), (3)(f)(1). Kolosso cites these provisions (Opp. 3, 7), but does not attempt to make a serious argument based on them.

While Sections 218.01(3)(a)(32) and (3)(f)(1) address "relocation," they do not involve a regulated dealer's "right" to relocate in violation of its contract. Instead, these provisions are designed to protect a third-party dealer's existing location and market from unreasonable attempts by the ***manufacturer*** to establish or bring in a new dealership. See

Wis. Stat. §§ 218.01(3)(a)(32), (3)(f)(1) (1985-86). In further contrast with the regulation at issue in this case, these provisions allow the third-party dealer to protest during a prospective licensing decision, where the State has an interest in its licensing processes, whereas Section 218.01(3x) retroactively impairs a contract between two private parties.

Thus, none of the statutory provisions Kolosso cites or relies on give credence to its argument that Section 218.01(3x) was foreseeable.

2. Kolosso's Assumptions On The Merits Do Not Alter The Circuit Conflict.

The foregoing discussion of the foreseeability of Section 218.01(3x) should not distract from the conflict among the circuits, which Kolosso does not deny nor even address. Instead of addressing the fundamental division in the circuits over the substantiality, or foreseeability, of a contract impairment, respondent erroneously assumes the accuracy of Se[illegible]h Circuit's approach and merely attempts to bolster the facts used to support the decision below.

The clear circuit split cannot be dismissed so easily. As we explained in the Petition (at 15-18), the Eighth Circuit (in contrast to the court below) relied on two criteria to determine the foreseeability of a retroactive contractual impairment: the absence of previous retroactive legislation in the area,[5] and the fact that retroactive application of similar franchise statutes had "almost uniformly been held unconsti-

---

[5] Kolosso relies on a distinction without a difference in explaining that the previous prospective legislation at issue in *Holiday Inns* had broader scope than the prior prospective legislation in this case. Opp. 21-22. The court in *Holiday Inns* did not mention or rely on the ***scope*** of the earlier regulations, however. The court instead rested its opinion on the ***nonretroactivity*** of the earlier pertinent statutes. Just as in *Holiday Inns*, all prior related statutes and regulations here were prospective only.

tutional." *Holiday Inns*, 29 F.3d at 385. Both of these criteria were met in this case, see Pet. 17-18, but were ignored by the Seventh Circuit.

Kolosso turns a blind eye to this conflict in the lower courts and, like the Seventh Circuit, merely assumes without discussion that the only proper foreseeability analysis involves examining the quantity of prior legislation — prospective or retroactive, constitutional or unconstitutional. See Opp. 21-23. Kolosso's assumption of the correctness of one side of a circuit conflict hardly serves as an argument against review by this Court to resolve the conflict. As we demonstrated in the Petition, the conflict on this issue is clear and intolerable, creating grave uncertainty in the field of national franchise agreements. Review by this Court is plainly warranted.

It may be inconvenient for the State of Wisconsin to be required to justify impairments in terms of the public necessity. The prior decisions of this Court, and the heretofore settled jurisprudence of the Constitution demand it. So did our Founding Fathers. In their only debate on this clause, Governeur Morris opined that there were a thousand laws relating to contracts and that limiting impairment would go too far. But James Madison was of the view that "* * * inconveniences might arise from such a prohibition, but thought on the whole it would be overbalanced by the utility of it." NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, reported by James Madison, August 28, 1787, at 440 (Farrand ed. 1966). Madison's view prevailed then, and should prevail now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ALLAN M. HUSS
DaimlerChrysler Corporation
1000 Chrysler Drive
Auburn Hills, MI 48326
(248) 512-4126

ERIKA Z. JONES
Counsel of Record
JOHN J. SULLIVAN
Mayer Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 463-2000

Counsel for Petitioner

FEBRUARY 1999